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No. 92-709

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*,
Petitioners,
v.
CITY OF SEWARD, AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1547,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS CITY OF SEWARD AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1547 IN OPPOSITION

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ARGUMENT

In the *Boston Harbor* case [1] which was argued to this Court on December 9, 1992, and is pending *sub judice*—the petitioners tendered for decision the following question:

> The 1959 Congress amended the National Labor Relations Act ("NLRA") to safeguard the validity of master collective bargaining agreements that would bind all contractors and subcontractors on a construction project. In doing so, Congress acted to authorize the continued use of an arrangement, traditional in the construction industry, that developed to meet the

[1] *Building Trades Council, etc., et al. v. Associated Builders & Contractors, etc.*, Nos. 91-761 & 91-274.

> industry's special needs for assured labor relations stability, adequate supplies of skilled labor, and fixed labor costs throughout the life of a project as a whole.
>
> The question presented here is whether the NLRA impliedly denies state and local governments, when acting as owners and developers of their property, the right to seek the same kind of labor arrangements and economic advantages in developing their property that the NLRA allows to private property owners. [Petitioners' Merits Brief in Nos. 91-761 & 91-274, i.]

In the instant case, the petitioner Associated Builders and Contractors tenders the same legal question rephrased in a more tendentious fashion:

> Whether a governmental municipality is prohibited by the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*, from interfering with the process of collective bargaining in the private sector by requiring private construction employers to sign collective bargaining agreements with a union as a precondition of performing government work. [Petition for Certiorari, No. 92-709, i.]

Indeed, the ABC urges that the Ninth Circuit decision below, "under virtually identical facts [as those presented to the First Circuit in the decision under review in the *Boston Harbor* case], reached a conclusion opposite [to that of the First Circuit in the *Boston Harbor case.*]" Pet. 9. On this premise, the ABC argues that "the Ninth Circuit's decision directly conflicts with the *Boston Harbor* holding" of the First Circuit.

1. On petitioners' own representations, then, under this Court's settled practice the most that is called for is to hold this case for disposition pending the issuance of the *Boston Harbor* decision.

2. Having said that much, we would be derelict if we did not add that the Ninth Circuit decision below *in fact* rests on a far narrower legal ground than the First Circuit's *Boston Harbor* decision. The decision below,

moreover, on its own premises, is both entirely distinct from the *Boston Harbor* decision and entirely consistent with the National Labor Relations Act and the labor law preemption doctrine, and is in conflict with no other decision of any court. We therefore submit that the preferable cause is to consider the *certiorari* petition now and to deny the petition outright.

(a) While petitioners depict this case as legally and factually identical to the *Boston Harbor* case, the Ninth Circuit proceeded on the premise that there is "a crucial distinction between *Boston Harbor* and this case." Pet. App. A11-A12. The court below reasoned:

> The Contractors . . . overlook a crucial distinction between *Boston Harbor* and this case. The MWRA in *Boston Harbor* did not act out of its concerns as a public employer; unlike the City of Seward, it did not employ workers who had traditionally performed the work that would be contracted out. Thus, the purpose of the union signatory requirement in *Boston Harbor* was not to preserve work traditionally performed by city employees. Here, by contrast, Seward is a public employer that has a collective bargaining agreement [("CBA")] with the union representing its utility's electrical employees and the CBA defines the relevant bargaining unit broadly enough to cover the power line renovation work. The union signatory requirement has been imposed to preserve work traditionally performed by members of the bargaining unit.
>
> . . . . *Boston Harbor* itself makes clear that NLRA preemption principles do not apply to an action by state or local government acting out of concerns it may have as a public employer. [935 F.2d 345,] 354 . . . . The fact that Seward will not be the actual employer of the workers on the line renovation project is irrelevant, so long as Seward acted in its capacity as a public employer in enforcing the terms of a valid work preservation clause in its CBA with the IBEW. [Pet. App. A11-A13 (internal footnotes and quotation omitted).]

In relying on this distinction, the Ninth Circuit noted that § 2(2) of the NLRA explicitly exempts states and municipalities from the Act's regulations on employers. *See* 29 U.S.C. § 152(2). This congressional judgment, the Ninth Circuit explained, represents a policy that state and local public employers, in dealings with their own employees (or, as in this case, with their employees' elected bargaining representative), should have greater flexibility in formulating labor relations policies than should private sector employers. That being so, said the Court below:

> Were we to interpret the NLRA as prohibiting a municipality from fulfilling its obligations as a public employer under an otherwise valid work preservation clause in a public sector collective bargaining agreement, we would be paradoxically attributing to Congress the intent to impose more stringent labor regulations on public employers than on private employers. Such an interpretation of the NLRA would be at odds with Congress' command in section 2(2) that public sector labor relations be left unregulated by the federal government. It would indeed transform the preemption case law into a round-about way of redacting, at least partially, section 2(2) of the NLRA. [Pet. App. A13.] [2]

(b) For these reasons, the decision below does not, in fact, conflict with the decision under review in the *Bos-*

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[2] Petitioners appear to argue that the relevant provision of the collective bargaining agreement in this case would not have been valid for a private sector employer and union. *See* Pet. 14-16. As the Ninth Circuit noted, however, petitioners made no such argument below. *See* Pet. App. A10, n.2 ("The Contractors do not dispute that the clause pursuant to which Seward acted would be a valid work preservation agreement if entered by a private employer.") Moreover, petitioners' new argument in this regard relies on cases outside the relevant context of agreements "in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction," which is the context of the instant case and which the NLRA expressly separates out for special, more permissive, treatment. *See* 29 U.S.C. § 158(e).

ton Harbor case. And petitioners have not even attempted to show that the decision below, on the actual reasoning of the Ninth Circuit, conflicts with any other decision of any other court. Indeed, petitioners have not even attempted to show that facts similar to those that the Ninth Circuit found "crucial" to its decision have ever before arisen in litigation.[3]

CONCLUSION

For the foregoing reasons, the petition should be denied. If, however, the Court believes that its resolution of the *Boston Harbor* case will be relevant to its disposition of the petition herein, the respondents request that the Court hold this petition for disposition pending the issuance of the *Boston Harbor* decision.

Respectfully submitted,

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[3] Petitioners have asserted that the Solicitor General, in his *Boston Harbor* brief, had questioned the notion that the issue in the instant case was legally distinct from the issue in the *Boston Harbor* case. *See* Pet. 16-17 n.7 (*citing* Brief of the United States as *Amicus Curiae* in Nos. 91-261 & 91-274, 24 n.17). This is not so. In fact, the Solicitor General's only point was that—because few public agencies directly employ complements of construction employees to do their construction work, as the City of Seward does—the distinction drawn by the Ninth Circuit in this case would not have substantial significance to many public agencies.